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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Cash Haggadone
v.
Joseph A. Cavanna

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Opposition No. 115,867
to Application No. 75/550,732
filed on September 10, 1998

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Eric M. Trelz and Ashley Ratcliffe Beumer of Polsinelli, Shalton & Welte for Cash Haggadone.

Joseph A. Cavanna, *Pro Se*.

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Before Quinn, Hohein and Walters, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Cash Haggadone filed his opposition to the application of Joseph A. Cavanna to register the mark ABERDEEN for "entertainment services, namely, live

performances by a musical group," in International Class 41.[1]

As grounds for opposition, opposer asserts that applicant's mark, when applied to applicant's services, so resembles opposer's previously used mark ABERDEEN for "entertainment services, namely, live performances by a musical group" as to be likely to cause confusion, under Section 2(d) of the Trademark Act.

Applicant, in his answer, admitted that the marks are identical, but denied the remaining salient allegations of the claim.

The Record

The record consists of the pleadings; the file of the involved application; opposer's discovery deposition of applicant, specified responses of applicant to opposer's requests for admissions, and applicant's filing receipt, all made of record by opposer's notice of reliance; opposer's responses to applicant's interrogatories and document requests, and an excerpt from an Internet web site,[2] all made of record by

[1] Application Serial No. 75/550,732, filed September 10, 1998, based upon use of the mark in commerce, alleging first use as of February 1, 1997 and first use in commerce as of February 17, 1998.

[2] Opposer objects to the authenticity of the Internet web site excerpt submitted by applicant and further contends that it is inadmissible on the ground of hearsay. Opposer mistakenly relies on *Raccioppi v.*

applicant's notice of reliance; the testimony depositions of Cash Haggadone, opposer, with accompanying exhibits; and the testimony deposition of Joseph Cavanna, with accompanying exhibits. Both parties filed briefs on the case but a hearing was not requested.

Analysis

The parties' marks are identical, as applicant admits, and their entertainment services are identical. Both opposer and applicant have musical groups that provide live performances; they have both produced and sold CDs of their music; and the evidence establishes that they both market their services and their music to the same classes of purchasers through the same channels of trade. For example, they both market their music directly to radio stations and via the Internet and through record stores and live performances, among other methods, to the general public.

Apogee, Inc., 47 USPQ2d 1368 (TTAB 1998,) for the proposition that an Internet web site excerpt must be authenticated by the testimony of the person who downloaded the page. However, *Raccioppi* is distinguished from the situation herein because it pertains to an interlocutory motion, rather than to a document submitted during trial under notice of reliance. The Internet web page is clearly a publicly available document and it contains, on its face, the date and the web site from which it was downloaded. Therefore it is adequately authenticated and we have considered it to be part of the record. We agree with opposer that the information contained therein is hearsay for the truth of that information and we have not considered it for that purpose.

In view of the undisputed facts that the marks and services of the parties are identical, it is clear that confusion as to the source of these services is likely.

Thus, the issue remaining to be decided, and the primary issue in this case, is priority of use. Applicant's filing date of September 10, 1998 is, of course, a constructive date of first use for the purpose of this proceeding. In the application, applicant claims first use as of February 1, 1997 and use in commerce as of February 17, 1998. However, applicant seeks, in this proceeding, to establish earlier dates of first use, which he must establish by clear and convincing evidence, rather than a mere preponderance of the evidence. *See Hydro-Dynamics, Inc. v. George Putnam & Co., Inc.*, 811 F.2d 1470, 1473, 1 USPQ2d 1772, 1773-74 (Fed. Cir. 1987); and *Elder Mfg. Co. v. International Shoe Co.*, 194 F.2d 114, 118, 92 USPQ 330, 332 (CCPA 1952).

We begin with applicant's evidence. Applicant has established, by clear and convincing evidence, that he first used ABERDEEN as a trademark to identify his band in June or July 1996; that for the second half of 1996, applicant was writing music and promoting the band, and the band was practicing and recording; that ABERDEEN

finished its first recording in December 1996 and released the recording in January 1997; that the first live performance of applicant's band ABERDEEN was on February 15, 1997[3]; and that applicant's band has continued to perform live regularly, and has released songs and albums on tape, CD and on the Internet, has had its music played on radio, and has sold its CDs over the Internet, at performances, and in retail stores. Applicant's band has performed in New York, New Jersey and Pennsylvania.

Turning to opposer, opposer alleged in his notice of opposition that he has been using the mark ABERDEEN in connection with the same services as applicant since at least October 1997. During trial, opposer sought to establish his use of ABERDEEN in connection with his band since 1994. Applicant contends that opposer has not met his burden of establishing use earlier than October 1997.

Opposer testified that he formed his band, called ABERDEEN, in July or August 1994; that, from August to October 1994, he wrote songs and distributed tapes to coworkers to promote the band; that the band's first live performance was on October 31, 1994, in Overland Park,

[3] Applicant's band's first live performance for which they received monetary compensation was October 16, 1997. Applicant sold CDs at each

Kansas, followed by a performance on November 17, 1994, in Kansas City, Missouri. While opposer states that the band was paid for its performances, most of the performances from 1994 to 1997 were house parties, so opposer has no documentation in support of these statements. Opposer stated that the band continued to perform about once a month; that opposer created the band's web site in late 1995; and that, in 1997, the band became successful and began playing in clubs, for which opposer has supporting documentation. Opposer's band has performed in Kansas, Missouri, Nebraska, Iowa, Illinois and Minnesota, and had its music played by radio stations. Opposer has sold most of the band's music recordings through its website and Amazon.com, with additional sales at performances and retail stores in areas where the band has performed. The band's first professionally produced CD was released in September 1997, and its first full-length album was released September 19, 1999.

Although opposer does not support his testimony about the band's pre-1997 performances with paper documentation such as fliers or receipts, applicant does not present evidence that reasonably challenges opposer's

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of its performances regardless of the band's compensation for the

credibility. Further, opposer's explanation as to why he has no supporting documentation is reasonable. Therefore, we find that opposer has established his use of the mark ABERDEEN in connection with a band that has been providing live musical performances since October 1994.[4] Applicant's evidence demonstrates that his band's first live performance, the services identified in the application, was February 15, 1977. Since opposer's first use date significantly precedes applicant's first established date of use, opposer has priority in this case.

Therefore, in view of opposer's priority and the fact that applicant and opposer use identical marks in connection with identical services, a likelihood of confusion exists and registration is denied to applicant.

Decision: The opposition is sustained and registration to applicant is refused.

performance.

[4] Such use is actual use, not use analogous to trademark use, as suggested by applicant.